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No. 93-999

In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION, PETITIONER

v.

POLITICAL CONTRIBUTIONS DATA, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE UNITED STATES

The Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), directs a court to award attorney fees to a prevailing party (with less than a specified level of assets) in non-tort civil actions brought by or against the United States, unless "the position of the United States was substantially justified." The court of appeals in this case determined that the government's position could not be "substantially justified" if that position had been rejected as unreasonable in the merits phase of the litigation. That holding directly affects all government agencies (not only the FEC),

because it seriously expands the government's liability for attorney fees under EAJA. The United States has a significant interest in assuring that the scope of its liability for attorney fees is not expanded beyond the limits established by Congress.[1]

STATEMENT

The Federal Election Campaign Act (FECA), 2 U.S.C. 431-455, requires the Federal Election Commission (FEC) to provide public access to the reports of political contributions filed by political committees and individuals, but prohibits the sale or use of the information so provided "for the purpose of soliciting contributions or for commercial purposes." 2 U.S.C. 438(a)(4)).

Respondent is a private company formed to sell information about political contributions. Pet. App. 43a. The FEC filed a civil enforcement action against respondent to enjoin its sale of lists of individual contributors to political causes, arranged by congressional district and corporate affiliation. These lists were derived from FEC-provided information. The FEC's suit was based on its view that the sale of these lists was a prohibited "commercial purpose" under Section 438(a)(4). Although the district court granted summary judgment to the Commission (Pet. App. 39a-73a), the Second Circuit reversed. *Id.* at 74a-91a. The court rejected the FEC's interpretation of

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[1] To avoid any uncertainty about the Federal Election Commission's statutory authority to represent itself in this case in this Court, the Solicitor General has authorized the General Counsel of the Commission to file a petition in this case. This amicus brief is filed to express the government's views on the questions presented.

the statutory "commercial purposes" prohibition as "unreasonable," and held that, in light of the FECA's "overarching philosophy" favoring public disclosure of campaign contribution information (*id.* at 76a), the "commercial purposes" prohibition was inapplicable to respondent's activities. *Id.* at 90a-91a.

The district court thereafter denied respondent's request for attorney fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d). Pet. App. 14a-35a. Applying this Court's ruling in *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988), that "a position is 'substantially justified' if it has a 'reasonable basis both in law and fact' or if it 'could satisfy a reasonable person' " (Pet. App. 23a, quoting *Pierce* v. *Underwood*), the district court examined the entire record of the case and found that, even though the FEC's position was ultimately held to be incorrect, it was nevertheless "substantially justified." Pet. App. 24a-34a.[2]

The Second Circuit again reversed, with Judge Jacobs dissenting. Pet. App. 1a-13a. The majority held that the FEC's position could not be "substantially justified" because an earlier panel of the court of appeals had held that the agency's position was "unreasonable." *Id.* at 8a-9a. The court held that the merits decision "conclusively established that the [FEC's] position was not substantially justified so as to bar an award of attorney's fees." *Id.* at 9a. The court majority refused to apply an abuse of discretion standard of review to the lower court's decision. *Ibid.*

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[2] The district court also denied the fee application as untimely. Pet. App. 19a-22a. The court of appeals reversed that holding. *Id.* at 6a. The FEC's certiorari petition does not seek further review of the timeliness issue.

In so doing, the court expressly rejected five decisions from four other circuits holding that EAJA fee applications require the district court to undertake a separate inquiry into the justification for the government's position—an inquiry not governed by the prior decision on the merits. *Id.* at 8a.[3]

Judge Jacobs' dissent concluded (Pet. App. 10a-13a) that the district court had properly followed the substantial justification analysis mandated by *Pierce* v. *Underwood*, *supra*, and that its findings "easily withstand review" under the abuse-of-discretion standard required by that decision. Pet. App. 13a.

DISCUSSION

When federal administrative agency action is judicially challenged as inconsistent with the governing statute, courts ordinarily apply a highly deferential standard of review under which the agency's interpretation of the statute can be rejected only if it is unreasonable or arbitrary. The Second Circuit has held in this case that, when an agency's position on the merits is rejected in such a case as "unreasonable," that rejection "conclusively establishe[s]" that the agency's position was not "substantially justified" for purposes of a subsequent EAJA fee

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[3] The court of appeals refused to follow *FEC* v. *Rose*, 806 F.2d 1081 (D.C. Cir. 1986); *United States* v. *Paisley*, 957 F.2d 1161 (4th Cir.), cert denied, 113 S. Ct. 73 (1992); *Welter* v. *Sullivan*, 941 F.2d 674 (8th Cir. 1991); *Griffon* v. *HHS*, 832 F.2d 51 (5th Cir. 1987); and *Cinciarelli* v. *Reagan*, 729 F.2d 801 (D.C. Cir. 1984). Instead, the court relied on *Oregon Natural Resources Council* v. *Madigan*, 980 F.2d 1330 (9th Cir. 1992), which it read as holding that if the government's action has been held to be unreasonable on the merits, then it necessarily is not "substantially justified" under EAJA. Pet. App. 7a-8a.

application. This holding transforms EAJA into an automatic fee-shifting statute in such cases. In doing so, it expands the government's liability for attorney fees well beyond Congress's intent in enacting EAJA. The holding of the court below is also flatly inconsistent with this Court's decision in *Pierce* v. *Underwood*, 487 U.S. 552 (1988), and has been rejected by all other circuits that have considered the issue. We therefore agree with petitioner that summary reversal is appropriate. Alternatively, plenary review should be granted in order to resolve the existing circuit conflict.

1. The Equal Access to Justice Act, 28 U.S.C. 2412(d), is a waiver of sovereign immunity, rendering the federal government liable for attorney fees under specific conditions. See *Ardestani* v. *INS*, 112 S. Ct. 515, 520 (1991). A central limitation on the EAJA waiver of the government's immunity to fee awards is that fees cannot be awarded if the government's position was "substantially justified." 28 U.S.C. 2412(d)(1)(A).

Because of the deferential standard of judicial review ordinarily applicable to federal agency statutory interpretations and policies,[4] almost all cases

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[4] See *Pierce*, 487 U.S. at 564-565 (equating "substantial evidence" review under the Administrative Procedure Act to a reasonableness standard); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984) (an agency's interpretation of a statute or regulation which it administers can only be rejected if a court finds it to be unreasonable or impermissible); 5 U.S.C. 706(2)(A) (providing that agency actions are to be reviewed to examine whether they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). See also *Griffon* v. *HHS*, 832 F.2d 51, 52 (5th Cir. 1987); *Evans* v. *Sullivan*, 928

where an agency does not prevail on the merits involve a judicial determination that the government's position was "unreasonable." Accordingly, if the Second Circuit's approach—that a merits finding that the government's action or interpretation was unreasonable "conclusively establishe[s] that the [government's] position was not substantially justified" (Pet. App. 9a)—is followed, EAJA fees will be required to be awarded almost every time an eligible party prevails against an agency's position, with the award being based solely on the fact that the agency position was not adopted.

In enacting EAJA, however, Congress expressly rejected a proposal providing for the automatic award of attorney fees to prevailing parties in agency litigation. As the 1980 House Committee Report explained (H.R. Rep. No. 1418, 96th Cong., 2d Sess. 13-14 (1980)):

> Alternative standards were considered. For example, S. 2354, the predecessor to S. 265 in the 95th Congress, allowed for automatic awards to prevailing parties. This mandatory award was rejected because it did not account for the reasonable and legitimate exercise of governmental functions and thus might have a chilling effect on proper government enforcement efforts.[5]

F.2d 109, 111 (4th Cir. 1991); *Luciano Pisoni Fabbrica Acessori Instrumenti Musicali* v. *United States*, 837 F.2d 465, 467 (Fed. Cir.), cert. denied, 488 U.S. 819 (1988).

[5] The House Committee Report pertaining to the 1985 reenactment of EAJA (H.R. Rep. No. 120, 99th Cong., 1st Sess. 9-10 (1985)) states that "[a]gency action found to be arbitrary and capricious or unsupported by substantial evidence is

Cf. *Roanoke River Basin Ass'n* v. *Hudson*, 991 F.2d 132, 139 (4th Cir. 1993) (EAJA "was never intended to chill the government's right to litigate or to subject the public fisc to added risk of loss when the government chooses to litigate reasonably substantiated positions, whether or not the position later turns out to be wrong").[6]

2. In *Pierce* v. *Underwood*, *supra*, this Court recognized that the disposition of the merits of a case does *not* control the inquiry into whether the government's position was "substantially justified"

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virtually certain not to have been substantially justified under the Act." However, this Court, in *Pierce* v. *Underwood*, 487 U.S. at 566-568, rejected the 1985 Report's definition of "substantial justification" (of which the above language is a part) as unpersuasive because it was subsequent legislative history, offered by the 1985 Congress as a definition of the terms used in the 1980 legislation and re-enacted without change in 1985. As the Court explained, the 1985 Report's definition "is not an explanation of any language that the 1985 Committee drafted, because on its face it accepts the 1980 meaning of the terms as subsisting, and because there is no indication whatever in the text or even the legislative history of the 1985 reenactment that Congress thought it was doing anything insofar as the present issue is concerned except reenacting and making permanent the 1980 legislation." *Id.* at 566-567.

[6] The risk of this "chilling effect" is real. Unlike many other significant money judgments that are paid out of the non-agency specific judgment fund (see 28 U.S.C. 2414), an EAJA fee awarded under 28 U.S.C. 2412(d)(4) must be paid from the defendant-agency's own budget. Thus, the threat of a large fee award can easily serve as a deterrent to agency action in an unsettled area of the law, especially in times of tight fiscal constraints.

under EAJA.[7] *Pierce* recognizes that, by the time an EAJA petition is filed in the district court, the government has lost the case on the merits. 487 U.S. at 561. Nonetheless, *Pierce* holds that the district court must undertake a separate inquiry to determine whether, *before* the merits ruling, the government was substantially justified in believing the law to have to been to the contrary. *Ibid.*

In accordance with *Pierce*, the courts of appeals have, until the decision below, consistently recognized that the question whether the government's position was "substantially justified" under EAJA is legally distinct from the question of whether it was "reasonable" for purposes of the merits decision.[8]

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[7] This Court explained, "[c]onceivably, the Government could take a position that is not substantially justified, yet win; even more likely, it could take a position that is substantially justified, yet lose." 487 U.S. at 569. Moreover, "a position can be justified even though it is not correct, and * * * can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct." *Id.* at 566 n.2.

[8] *Abernathy* v. *Clarke*, 857 F.2d 237, 239 (4th Cir. 1988) (arbitrary and capricious standard of review); *Sierra Club* v. *Secretary of Army*, 820 F.2d 513, 517-518 (1st Cir. 1987) (same); *FEC* v. *Rose*, 806 F.2d 1081, 1087-1090 (D.C. Cir. 1986) (same); *Spawn* v. *Western Bank-Westheimer*, 989 F.2d 830, 840 (5th Cir.), petition for cert. pending, No. 93-471 (same); *Luciano Pisoni Fabbrica Acessori Instrumenti Musicali*, 837 F.2d 465, 467 (Fed. Cir.), cert. denied, 488 U.S. 819 (1988) (substantial evidence standard of review); *Welter* v. *Sullivan*, 941 F.2d 674, 676 (8th Cir. 1991) (same); *Pullen* v. *Bowen*, 820 F.2d 105, 108 (4th Cir. 1987) (same); *Griffon* v. *HHS*, 832 F.2d 51, 52-53 (5th Cir. 1987) (*Chevron* standard of review). See *Andrew* v. *Bowen*, 837 F.2d 875, 878 (9th Cir. 1988) (in EAJA context, "arbitrary and capricious conduct is not per se unreasonable"); accord, *Kali* v. *Bowen*, 854 F.2d 329, 333 (9th Cir. 1988). See

This is not to say that the decision on the merits is irrelevant to the EAJA inquiry. Indeed, as several cases have recognized, analysis of the rationale of the merits decision can be a very useful indicator of the justification—or lack of justification—of the government's position. See, *e.g.*, *Oregon Natural Resources Council* v. *Madigan*, 980 F.2d 1330, 1332 (9th Cir. 1992)[9]; *Sierra Club* v. *Secretary of Army*, 820 F.2d 513, 517-518 (1st Cir. 1987); *United States* v. *Paisley*, 957 F.2d 1161, 1167 (4th Cir.), cert. denied, 113 S. Ct. 73 (1992). The merits decision, however, cannot itself be determinative of whether the government's position lacked substantial justification.

3. In *Pierce*, this Court expressly noted that the district court is in the best position to determine whether the government's position was "substan-

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also *United States* v. *Paisley*, 957 F.2d 1161, 1167 (4th Cir.) ("Although the impulse to equate ultimate judicial rejection of the government's merits position * * * with its lack of substantial justification is understandable, the courts perforce have rejected it as inappropriate, for to do so, 'would virtually eliminate the "substantially justified" standard from the statute.'") (quoting *Broad Avenue Laundry & Tailoring* v. *United States*, 693 F.2d 1387, 1391-1392 (Fed. Cir. 1982)), cert. denied, 113 S. Ct. 73 (1992).

[9] The court below incorrectly read *Madigan* as authority for its automatic fee-shifting approach. Pet. App. 7a-8a. The Ninth Circuit in *Madigan* relied, not on the mere fact that the government had lost on the merits, but on the "holding *and rationale*" of the merits panel—in particular, its conclusion that the statutory language was clearly inconsistent with the government's position, and that the "analysis was neither complex nor extraordinary." 980 F.2d at 1332 (emphasis added). Cf. *Kali* v. *Bowen*, 854 F. 2d 329, 333 (9th Cir. 1988) (recognizing that merits loss on deferential review is not determinative of EAJA "substantial justification" issue).

tially justified" under EAJA. *Pierce*, 487 U.S. at 559-560. Accordingly, the Court concluded, that determination rests within the sound discretion of the district court, subject to review by the court of appeals only for an abuse of discretion. *Id.* at 563. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 403-405 (1990). Applying this unambiguous holding, the courts of appeals heretofore have unanimously held that a district court's decision under EAJA on the question of whether the government's position was substantially justified is subject to review only for an abuse of discretion.[10] By vesting district courts with broad discretion over EAJA fee applications, the *Pierce* decision necessarily rejected the position, adopted by the court below in this case, that a loss on the merits "conclusively establishes" a right to fees.

In considering the fee application in this case, the district court carefully considered the rationale and the holding of the merits panel and concluded, in light of the entire record, that the government's position in this case had been substantially justified. Pet. App. 28a-34a. As Judge Jacobs observed (*id.* at 13a), the district court's findings in that regard "easily withstand review for abuse of discretion." The court of appeals' majority did not disagree with this con-

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[10] See *e.g.*, *Spawn*, 989 F.2d at 838-840; *Hanover Potato Products, Inc.* v. *Shalala*, 989 F.2d 123, 127-128 (3d Cir. 1993); *Paris* v. *HUD*, 988 F.2d 236, 238-239 (1st Cir. 1993); *Lundin* v. *Mecham*, 980 F.2d 1450, 1459 (D.C. Cir. 1992); *United States* v. *Paisley*, 957 F.2d at 1165-1170; *Stein* v. *Sullivan*, 966 F.2d 317, 319 (7th Cir. 1992); *Kali* v. *Bowen*, 854 F.2d 329, 331 (9th Cir. 1988). See also *Trahan* v. *Brady*, 907 F.2d 1215, 1217 (D.C. Cir. 1990) (discussing "the unqualified directive of *Pierce* to review EAJA decisions for abuse of discretion").

clusion. Instead, the majority ignored this Court's directive in *Pierce*,[11] and refused to apply the abuse-of-discretion standard in reviewing the district court's fee determination. That refusal was plain error.

In sum, the majority's analysis below is flatly inconsistent with the evident intent of Congress in enacting EAJA, with the teaching of *Pierce* v. *Underwood*, *supra*, and with the analysis of every other court of appeals that has considered the question.

CONCLUSION

The petition for certiorari should be granted and the decision below reversed, or, in the alternative, the case set for plenary review.

Respectfully submitted.

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[11] *Pierce* itself involved a situation in which several courts of appeals had rejected, as unreasonable, the agency's interpretation of its governing statute. See Pet. 15-16. This Court specifically rejected the argument that those rejections were determinative of the EAJA inquiry. *Pierce*, 487 U.S. at 569.